FILED BY CLERK
APR 27 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. LUIS ENRIQUE ORTEGA, Petitioner.	2 CA-CR 2010-0001-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20071579

Honorable Richard Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

Barton & Storts, P.C.
By Brick P. Storts, III
Tucson
Attorneys for Petitioner

E C K E R S T R O M, Presiding Judge.

¶1 Following a jury trial, petitioner Luis Ortega was convicted of two counts each of sexual abuse of a minor under the age of fifteen, molestation of a child, and sexual conduct with a minor under fifteen, all dangerous crimes against children, and two counts of threatening or intimidating. The trial court sentenced Ortega to a total of fifty-

seven years in prison. On appeal, we vacated Ortega's conviction and sentence for one count of molestation of a child, but affirmed all of his other convictions and sentences. *State v. Ortega*, 220 Ariz. 320, ¶ 1, 206 P.3d 769, 771 (App. 2008). Ortega filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., alleging that trial counsel, Edward Nesbitt, had rendered ineffective assistance. On review, Ortega challenges the trial court's summary dismissal of this petition, arguing he is entitled to a new trial, or at a minimum, to an evidentiary hearing. We will not disturb the court's ruling absent an abuse of discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse.

¶2 To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below prevailing professional norms and that the outcome of the case would have been different but for the deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). To demonstrate prejudice, the defendant must show there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "To avoid summary dismissal and achieve an evidentiary hearing on a post-conviction claim of ineffective assistance of counsel," a petitioner must present a colorable claim on both parts of the *Strickland* test. *State v. Fillmore*, 187 Ariz. 174, 180, 927 P.2d 1303, 1309 (App. 1996); *see also* Ariz. R. Crim. P. 32.6(c) (summary dismissal appropriate unless material issue of fact or law exists); Ariz. R. Crim. P. 32.8(a) (defendant entitled to hearing to determine material issues of fact). The decision whether a claim is colorable and warrants an

evidentiary hearing "is, to some extent, a discretionary decision for the trial court." *State v. D'Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988). We note that the same judge presided over both the trial and the Rule 32 proceeding in this matter.

¶3 In the affidavit attached as an exhibit to his petition below, Ortega attested that he had told Nesbitt that the minor victims and their mother "might not appear for trial." And, as Nesbitt attested in his affidavit, it was for that very reason that he did not conduct any pretrial interviews and instead asserted Ortega's speedy trial rights. However, the victims and their mother did, in fact, appear at the trial. "[D]isagreements as to trial strategy or errors in trial tactics will not support an effectiveness claim so long as the challenged conduct could have some reasoned basis." *State v. Meeker*, 143 Ariz. 256, 262, 693 P.2d 911, 917 (1984). A reviewing court should give deference to tactical decisions made by counsel and should refrain from evaluating counsel's performance in the harsh light of hindsight. *See Nash*, 143 Ariz. at 398, 694 P.2d at 228.

¶4 Ortega asserts, as he did below, that Nesbitt was ineffective because he failed to conduct any pretrial interviews, including that of Wendy Dutton, the state's child abuse expert. Dutton testified as a "cold file expert," which the trial court defined as a witness who "is not familiar with the particular victim or allegations, and played no role in investigating the case. Her testimony is confined to informing juries about general concepts in child sexual abuse cases—grooming; concealment, recantation etc."[1] Ortega

[1]To the extent Ortega also argues Dutton may not have been a "cold file expert" during a limited portion of her testimony, apparently suggesting Nesbitt was ill-prepared to cross-examine her at that juncture, the record simply does not support this argument. In the cited portion of the transcript, Dutton testified, "I can't speak for the individual

also argues extensively that Nesbitt should have challenged Dutton's academic credentials, specifically whether she had completed her Ph.D. The court correctly rejected these claims for the following reasons:

> These concepts [from Dutton's testimony] are sufficiently fundamental that it is inconceivable that an interview of Ms. Dutton would yield any favorable material for the defendant. Further, the concepts appear to be consistent with a common understanding of child-victim behavior such that even if defense counsel could attack Ms. Dutton as suggested, i.e. lying about her Ph.D., it would do little to undermine the validity of her testimony.

¶5 Ortega also asserts Nesbitt should have interviewed the arresting officers. The trial court accurately addressed Nesbitt's decision not to interview these "non-protected witnesses," finding their role in the prosecution to have been "limited," and noting that "[n]one offered direct, first-hand knowledge of the crimes. None conducted independent tests or investigations which would have been explored through an interview. And, defense counsel demonstrated sufficient familiarity with the reports and statements of these witnesses during trial that he was able to effectively cross-examine them." As the trial court's reasoning suggests, Ortega did not present an argument that satisfied either part of the *Strickland* test.

¶6 Ortega similarly contends Nesbitt should have interviewed "other witnesses." But Ortega does not state who these witnesses were, much less what testimony they would have provided, or that the outcome at trial would have been

---

people in this situation, but I can talk in terms generally about how courtroom testimony tends to affect people."

different if Nesbitt had interviewed the unidentified witnesses. Nor does anything in the post-conviction record suggest a basis for this vague and unsupported claim.

¶7 Ortega also asserts that this matter is "very similar" to *State v. Vickers*, 180 Ariz. 521, 885 P.2d 1086 (1994), because trial counsel in that case failed to interview any of the state's witnesses. *Vickers*, however, is readily distinguishable, in that it was a first-degree murder case where trial counsel's failure to interview the state's witnesses was only one of many egregious errors that satisfied both parts of the *Strickland* test. *Vickers*, 180 Ariz. at 525-27, 885 P.2d at 1090-92.

¶8 Finally, Ortega argues that Nesbitt's failure to assure that the interview tape of the primary victim's brother (also a victim himself) was translated from Spanish and transcribed caused "a major problem in [Nesbitt's] cross-examination" of the brother. However, as we noted on appeal, because the brother did not remember many details of the events in question, "the trial court permitted him to be excused and recalled the following day, so that an interpreter could transcribe his interview with the police detective to help refresh his memory." *State v. Ortega*, 220 Ariz. 320, ¶ 30, 206 P.3d at 778-79. Because the tape was, in fact, translated and transcribed, albeit not at Nesbitt's direction, we fail to see how Ortega was prejudiced.

¶9 Because Ortega has failed to establish a colorable claim for relief, we find no abuse of discretion in the trial court's dismissal of his claims without an evidentiary hearing. Although we grant the petition for review, we deny relief.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge